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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 37

CIVIL.

GENE DURFEE and LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Julia E. Duke, respectfully suggests that the petition for a writ of certiorari does not present a situation which calls for the issuance of such a writ, and respectfully requests that the petition for the writ be denied.

ADDITIONAL STATEMENT OF THE CASE.

The evidence in this case shows that respondent and her father before her were on a portion of the land in question, using it for agricultural purposes and clearing it in the early nineteen hundred twenties. By the nineteen hundred forties respondent had cleared a portion of the land and was farming it more extensively. In 1946 respondent secured a deed under appropriate statutes from Holt County, Missouri. She thereafter continued to occupy the land, clear it and farm it, and paid taxes upon it.

Petitioners did not appear in the picture until 1956, at which time they secured a tax deed from Richardson County, Nebraska. Petitioners do not have a clear chain of title stemming from an original patent, and there is no pretense that such a chain of title exists.

Petitioners, therefore, base their claim entirely on a Sheriff's Deed, and petitioners have never been in possession of the property, or any portion of it.

ARGUMENT AMPLIFYING REASONS WHY WRIT SHOULD NOT BE ALLOWED.

The opinion by Judge Blackmun from the Eighth Circuit Court of Appeals appearing at pages one to twenty-five of petitioners' appendix, answers fully and completely each and every argument now advanced by petitioners. With one exception that opinion discusses each and every case now presented by petitioners. It carefully analyzed each such case, gave it such weight as it deserved, and placed it in its proper category. It is perhaps presumptuous to attempt to improve in any way upon that opinion, but a few comments by way of explanation do seem proper.

Full Faith and Credit.

Petitioners rely upon five opinions in arguing that the full faith and credit clause was violated by the Blackmun opinion. Each and every one of these cases was carefully discussed by Judge Blackmun and put in its proper place. The first of these is *Adam* v. *Saenger*, 1938, 303 U.S. 59, 62, 82 L. Ed. 649, 652, 58 S. Ct. 454. Petitioners read into the decision in that case a conclusion which quite obviously is not there. The court said:

> "In a suit upon the judgment of another State the jurisdiction of the court which rendered it is open to judicial inquiry".

It further said:

> "When the matter of fact or law upon which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment."

Petitioners argue that there, therefore, must be implied a third finding that if jurisdiction was considered in the first trial it cannot be inquired into again. The opinion does not say that, nor intimate it. It simply says that the inquiry is always open, and must be gone into if not gone into in the first instance. The Blackmun opinion points out that *Adam* v. *Saenger* does not preclude a second forum's inquiry into the question of the first court's jurisdiction of the subject matter.

Petitioners secondly cite *Davis* v. *Davis*, 1938, 305 U.S. 32, 83 L. Ed. 26, 59 S. Ct. 3. This was a divorce case, and as pointed out by Judge Blackmun, is adhered to in divorce cases and the challenges therein to subject matter jurisdiction. It has no application to the question of jurisdiction of real property in other States.

Petitioners' third case is *Williams* v. *North Carolina*, 1944, 325 U.S. 226, 228, 229, 89 L. Ed. 1577, 1580, 1581, 65 S. Ct. 1092. This case does not, as we read it, enunciate the rule which petitioners seek to draw from it. It specifically says:

> "*Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operation only when, in the language of Kent, 'the jurisdiction of the court in another State is not impeached, either as to the subject matter or the person'. Only then is 'the record of the judgment * * * entitled to full faith and credit'."

It is further stated:

> "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment."

The first head note states:

> "The full faith and credit clause operates only with respect to judgments rendered by a court whose jurisdiction, either as to the subject matter or person, is not impeached."

The Blackmun opinion has very carefully considered this case, and has shown that it is not an authority to support petitioners' position.

In the fourth place petitioners rely upon *Stoll* v. *Gottlieb*, 1938, 305 U.S. 165, 176, 83 L. Ed. 104, 111, 59 S. Ct. 134. This was a bankruptcy case. It had nothing to do with real estate. The opinion itself indicates that this decision had no application to real property situations. It was said in that opinion, as Judge Blackmun has pointed out,

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope

> of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

Petitioners' last case is *Forsyth* v. *Hammond*, 1897, 166 U.S. 506, 41 L. Ed. 1095, 17 S. Ct. 635. This case did not deal with multi-State questions. There was a trial in the State's trial court and an appeal to the State Supreme Court. A Federal Court injunction action was then instituted. This in no way involved the jurisdiction of another State, and Judge Blackmun has very aptly pointed out that this opinion is easily explained, and is not pertinent to our question.

The basic pronouncement which we believe is controlling is in *Thompson* v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 21 L. Ed. 897, 899, where the court said:

> "As to a foreign judgment, it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or of the thing."

This was also discussed in *Milliken* v. *Meyer*, 1940, 311 U.S. 457, 462, 85 L. Ed. 278, 282, 61 S. Ct. 339, when the court said:

> "Where a judgment rendered in one State is challenged in another, a want of jurisdiction over either the person or the subject matter, is, of course, open to inquiry."

The Doctrine of Res Judicata.

In arguing that the doctrine of *res judicata* should apply, petitioners rely upon eight cases. Again, each and every case cited by petitioners was considered by Judge Blackmun, and carefully analyzed.

Petitioners' first case is *Forsyth* v. *Hammond, supra.* This has already been discussed. All of the issues were in the courts of one State, and the case has nothing whatsoever to do with an attack upon the jurisdiction of a court of another State.

The second case was *Stoll* v. *Gottleib, supra.* This case, as we pointed out, was a bankruptcy matter, and again has been discussed both by Judge Blackmun and in the present brief, and has been shown to be not controlling.

Petitioners' third case is *Jackson* v. *Irving Trust Company,* 1941, 311 U.S. 494, 85 L. Ed. 297, 61 S. Ct. 326. All of the litigation involved there took place in one State. The opinion caused Judge Blackmun no concern, and we believe it requires no further comment. It does not adjudicate the question presented at this time.

The next case relied upon by petitioners was *Davis* v. *Davis, supra.* This has been previously discussed; it is a divorce case and it is not applicable.

Treinies v. *Sunshine Mining Company,* 1939, 308 U.S. 66, 78, 84 L. Ed. 85, 93, 60 S. Ct. 44, is petitioners' next case. Strangely enough in that case an Idaho court held that a Washington court's judgment was void for lack of subject matter jurisdiction. The court said:

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question."

This opinion was carefully discussed by Judge Blackmun.

Next we come to *Chicot County Drainage District* v. *Baxter State Bank,* 1940, 308 U.S. 371, 84 L. Ed. 329, 60 S. Ct. 317. This opinion clearly is of limited application, as was the opinion in the bankruptcy case of *Stoll* v. *Gott-*

leib, supra. In *United States* v. *United States Fidelity and Guaranty Company*, 1940, 309 U.S. 506, 514, 84 L. Ed. 894, 899, 900, 60 S. Ct. 653, the court in speaking of its opinion in the *Chicot* case, said:

> "In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination * * *. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extraterritorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

Petitioners' next case is *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 75 L. Ed. 1244, 51 S. Ct. 517. This case had to do with jurisdiction of the person only. It had nothing to do with real property jurisdiction.

Petitioners' last case is *Chicago Life Insurance Company* v. *Cherry*, 1917, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492. This again, as Judge Blackmun pointed out, concerned jurisdiction of the person, wherein the court's jurisdiction over the person was litigated in the first instance, and was thus held to be *res judicata* at a later date. It again had nothing to do with jurisdiction of real property.

In addition to *Thompson* v. *Whitman, supra,* and *Milliken* v. *Meyer, supra,* the court may examine *Grover and Baker Machine Company* v. *Radcliffe*, 1890, 137 U.S. 287, 34 L. Ed. 670, 672, 11 S. Ct. 92, wherein the court quoted Mr. Justice Story in his Commentaries as follows:

> "No sovereignty can extend its process beyond its own territorial limits, to subject other persons or right of property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals; * * * Such is the familiar, reasonable and

just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other for all but national purposes, as they were before the Revolution."

Again in *Grubb* v. *Public Utilities Commission*, 1930, 281 U.S. 470, 475, 74 L. Ed. 972, 977, 50 S. Ct. 374, the court said:

> "The case in the State Court was so far identical with the suit in the Federal Court as respects subject matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity, operated to bar the further prosecution of the latter. That the State court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

Matters of Public Importance Involved.

Petitioners next purport to argue the public importance of the matters involved, but spend most of their time arguing that the decision of the Eighth Circuit Court binds neither Nebraska nor Missouri, and settles nothing. Only one case is cited there which has not been previously discussed. It is *United States* v. *171.74 Acres of Land, etc.*, and the citation is given as 206 F.2d 322. This apparently is a misprint, because the correct citation is 1962, 266 F. Supp. 322, 324, and the case as we read it is clearly in opposition to the position taken by petitioners. This litigation started when a petition was filed to register a judgment of the District Court of Iowa. At the trial in Ne-

braska the Nebraska court held the Iowa judgment void because Iowa had no jurisdiction over the land, since it was in Nebraska, and

> "Therefore, the Iowa judgment was not entitled to full faith and credit or to registration as a foreign judgment." (l.c. 324).

This judgment was affirmed by the Nebraska Supreme Court. An attack was then made on the judgment in the Federal District Court in Nebraska, and as the court said:

> "This evidence is clearly an attempt to relitigate the exact issues determined by the Courts of Nebraska. Whether this may properly be done is the key issue for the court to decide". (l.c. 324).

Without attempting to quote the very many pertinent statements made in this decision, it points out quite sharply that there could be no further litigation in the Nebraska courts because Nebraska had already litigated the subject matter. The opinion agreed that Nebraska examined the jurisdiction of the Iowa court, found Iowa did not have jurisdiction of the subject matter, and thus refused full faith and credit to the Iowa judgment. The court did, however, make a very pertinent statement which answers the argument advanced by petitioners that the decision of the Eighth Circuit Court answers nothing. The court said, at l.c. 325:

> "Where a court of one State denies effect of a judgment of another State on the ground of absence of jurisdiction, although there had been a finding of the presence of such jurisdiction in a contested proceeding in the latter State, and the former judgment is not reversed on appeal, it has been held that the latter judgment of the former will be given effect as *res judicata*."

In further quoting from Section 10(e) of the Restatement of Judgment, it said:

> "Thus, if in the first action the court determines that it has jurisdiction over the subject matter, but in a second action between the parties the court determines that the court in the first action had no jurisdiction over the subject matter, then in a third action between the parties the court is bound by the determination in the second action."

The answer is that there will be no confusion if the opinion of the Eighth Circuit Court is allowed to stand, because it is the second and binding opinion, and it will finally and conclusively determine the issues.

As to the question of public importance, it is of the utmost importance that each State should be allowed to determine its own jurisdiction of land alleged to be within its confines. This is fundamental, and was clearly enunciated in *Grover and Baker Machine Company* v. *Radcliffe, supra.*

IN CONCLUSION.

The Blackmun opinion very clearly follows the applicable law both as to full faith and credit and *res judicata*. It is not in conflict with any opinion of the Supreme Court or of any appellate court. It is extremely unlikely that such a factual situation will again be presented.

We believe the cases amply demonstrate that the full faith and credit clause has not been violated, that the doctrine of *res judicata* does not apply, and that policy requires that the Federal Court in Missouri be allowed to inquire into the jurisdiction of the Court of Nebraska, and that the opinion of the Eighth Circuit Court of Appeals is not in conflict with any of the decisions of the Supreme

Court of the United States, but rather enunciates the settled, well considered and clearly defined legal principles which must govern situations of this character.

Respondent respectfully prays that certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE.

I, R. A. Brown, attorney for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 28, 1962, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit, upon the Petitioners, by depositing the same in a United States mailbox with first class postage prepaid, addressed to:

Mr. Harold W. Kaufmann,
730 Farm Credit Building,
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Mr. Alfred A. Fiedler,
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such being the post office addresses of said counsel of record for petitioners.

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